Filed 2/16/05 In re Elijah W. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ELIJAH W., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. GRADY W., Defendant and Appellant.	D044826 (Super. Ct. No. J514221)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Kelety, Judge. Reversed and remanded with directions.

Grady W. appeals the judgment terminating his parental rights over Elijah W. (Welf. & Inst. Code, § 366.26, subd. (b)(1)), contending the court failed to comply with

the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We agree.

BACKGROUND

In November 2001, when Elijah was one year old, the San Diego County Health and Human Services Agency (the Agency) commenced dependency proceedings because his mother, Crystal A., used marijuana and was in residential drug treatment; Elijah and his two-year-old sibling were found alone in Grady's apartment, with access to a bag of rock cocaine and a second floor balcony overlooking a steep hill; Elijah had a possible second degree burn on his hand, for which Grady had not obtained medical treatment; and Elijah tested positive for cocaine. The positive cocaine test was alleged in an amended petition filed in December.

Elijah was detained in Polinsky Children's Center, then in foster care. In January 2002, he was placed with Crystal. In early 2003, after Crystal's roommate was assaulted in the home in Elijah's presence and Crystal tested positive for alcohol, the court entered true findings on a supplemental petition and again placed Elijah in foster care. The section 366.26 hearing took place in July 2004.

ICWA

Grady contends the court failed to comply with the notice requirements of ICWA and lacked the information necessary to make a finding ICWA did not apply. He argues the Agency did not send notice to the Blackfeet tribe; while notice should have been sent to a number of Cherokee tribes, the record shows proper notice only to the Cherokee

Nation; and the forms the Agency sent omitted the birth date of Elijah's maternal grandfather and there was no inquiry whether it was obtainable from family members.

"'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) "[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) "If the identity or location of the . . . tribe cannot be determined, such notice shall be given to" the Bureau of Indian Affairs (BIA). (*Ibid.; Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247.) The Agency must provide "enough information to constitute meaningful notice." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175; accord, *In re Louis S.* (2004) 117 Cal.App.4th 622, 630.) It must also file with the juvenile court an original or a copy of each ICWA notice, the corresponding return receipts, and any responses. (*In re Karla C., supra,* 113 Cal.App.4th at pp. 175-178; *In re Louis S., supra,* 117 Cal.App.4th at p. 629.)

ICWA notice requirements are strictly construed. (*In re Karla C., supra,* 113 Cal.App.4th at p. 174, citing *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Notice must be given even if the Indian status of the child is uncertain *(In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422), there is merely a hint the child is an Indian child within the meaning of ICWA (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 258), or

there is "only a suggestion of Indian ancestry." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.)

According to the November 2001 detention report, Crystal said "she may be half-Cherokee Indian from the Oklahoma tribe" and the Agency would send notice to the BIA. In her paternity questionnaire, Crystal answered "yes" to the question whether Grady had any American Indian heritage. In response to the request that she name the tribe and band, she wrote "Black Foot"[1] and "Cherokee." In his questionnaire, however, Grady answered "no" to the question whether he had any American Indian heritage. At the detention hearing, the court found ICWA did not apply.

At the December 10, 2001 detention hearing on the amended petition, the court again found ICWA did not apply. In its December 20 jurisdictional and dispositional report, the Agency said that on December 3, it had sent notices to the BIA and "the 3 Cherokee-Oklahoma tribes." Attached to the Agency's July 2002 family maintenance review report was an undated response from the United Keetoowah Band of Cherokee Indians in Oklahoma stating based on the information supplied by the Agency, Elijah was not descended from anyone on the Keetoowah Roll, so he was not enrollable and the Band would not intervene in the case.

In its January 2003 family maintenance review report, the Agency said it had sent certified letters to "the Sacramento Indian Bureau of Affairs, Cherokee-Delaware Tribal

---

1 There is no "Black Foot" tribe; this may be a reference to the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana. (68 Fed. Reg. 68180 (Dec. 5, 2003).)

Council, the Cherokee-Keetoowah Band, and the Cherokee Nation Oklahoma" but had received no responses. At the hearing, the court again found ICWA did not apply.

At the February 2003 detention hearing on the supplemental petition, the court once again found ICWA did not apply. In its April jurisdictional and dispositional report on the supplemental petition, the Agency stated Crystal "states that her father is Cherokee Indian and was born and raised in Oklahoma[; he] is on the Cherokee Band Tribal Role [*sic*] Sheet and [she] assumed she was as well." In the report, the Agency claimed that on March 18, "letters were sent to the Cherokee Nation in North Carolina to determine Indian Heritage with that specific tribe," but there had been no response, and "[a]ll of the other tribes that have been noticed have not as of yet responded to certified letters sent by the Agency." Attached to the report were a notice to the Sacramento Area Director of the BIA and certified mail return receipts from the Sacramento Area Director of the BIA, the Cherokee-Delaware Tribal Council, the Cherokee-Keetoowah Band, the Cherokee Nation Oklahoma and the "Principle Chief" in Cherokee, North Carolina. Also attached was a December 31 letter from the Cherokee Nation stating Elijah could not be traced in tribal records through the listed adult relatives and was not considered an Indian child in relationship to the Cherokee Nation based on the information the Agency provided. At the April 2003 jurisdictional and dispositional hearing on the supplemental petition, the court found ICWA did not apply.

The Agency concedes there is insufficient evidence of compliance with the ICWA notice requirements, but contends there was no duty to notify the Blackfeet tribe because Crystal identified that tribe in reference to Grady's heritage, not her own, and Grady

denied any Indian heritage. The Agency's concession is proper, and we agree notice to the Blackfeet tribe is unnecessary. "'[P]arents are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe and those of each other. [Citation.]'" (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 257, quoting *In re Kahlen W., supra,* 233 Cal.App.3d at p. 1425.) "We agree that '[t]o maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child. [Citation.]'" (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 257, quoting *In re M.C.P.* 153 Vt. 275 [571 A.2d 627, 634-635].) Nonetheless, where, as here the father specifically denies Indian heritage and there is no reason to believe the mother has superior knowledge of the father's ancestry, notice based on her statement is not required. It is not necessary to completely abandon common sense in this process.

However, the record does not show that the Agency gave notice to all three federally recognized Cherokee tribes: Cherokee Nation, Oklahoma; Eastern Band of Cherokee Indians of North Carolina; and United Keetoowah Band of Cherokee Indians in Oklahoma. (68 Fed. Reg. 68180 (Dec. 5, 2003).) The only notice in the record, that to the BIA, does not contain the birth date of Crystal's father, nor is there any indication in the record of an inquiry. A notice the Agency sent the BIA regarding Elijah's sibling contains this statement: "The mother stated that her father Gary A[.] may be half Cherokee Indian from Oklahoma City. She is not sure about membership. She does not

have any contact with her father." Finally, it is unclear whether the return receipts filed apply to Elijah, or to his two siblings.

The juvenile court erred when it found that ICWA did not apply.

DISPOSITION

The judgment terminating parental rights is reversed. This matter is remanded to the juvenile court, with directions that it (1) require the Agency to give proper ICWA notice and file with the court the notices, return receipts, and any responses; and (2) hold a new section 366.26 hearing. If, at the new section 366.26 hearing, the court determines the ICWA notice was proper and no Indian entity seeks to intervene or otherwise indicates Elijah is an Indian child as defined by ICWA, the court shall reinstate all of its previous findings and orders, including the termination of parental rights. If, on the other hand, an Indian entity determines Elijah is an Indian child under ICWA, the court shall conduct the detention, disposition and all subsequent hearings in accordance with ICWA.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

O'ROURKE, J.